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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

HARRISON P. CRONIC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals correctly reversed respondent's convictions on the ground that he did not receive effective assistance of counsel at trial, without identifying any act or omission by counsel that departed substantially from what a reasonably competent criminal defense attorney would have done under the circumstances and without finding any prejudice to respondent.

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HARRISON P. CRONIC

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-7a) is reported at 675 F.2d 1126.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 8a) was entered on April 19, 1982, and a petition for rehearing was denied on July 16, 1982 (App. C, *infra*, 9a). On September 9, 1982, Justice White extended the time within which to file a petition for a writ of certiorari to and including October 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence.

STATEMENT

1. On February 5, 1980, respondent and co-defendants Wylie Merritt and Carolyn Cummings were indicted in the United States District Court for the Western District of Oklahoma on 13 counts of mail fraud and unlawful use of a fictitious name, in violation of 18 U.S.C. 1341 and 1342. The indictment charged that respondent and the co-defendants were involved in a check-kiting scheme between banks in Tampa, Florida and Norman, Oklahoma. The checks were drawn on the accounts of Skyproof Manufacturing, Inc., a Florida corporation that was held out as a manufacturer of roof trusses for mobile homes (App. A, *infra*, 1a–2a).

Respondent and Cummings initially were represented by a single attorney, Arnold D. Levine of Tampa, Florida. Prior to trial, however, Levine moved to withdraw as counsel on the ground that the interests of Cummings and respondent were in conflict. Respondent filed an opposition to the motion to withdraw. After the motion was filed, the court appointed another attorney, Chris Colston, to represent respondent, subject to the possibility of relieving Colston if the court declined to grant Levine's motion to withdraw (6/19/80 Tr. 2, 5-6).[1]

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[1] "6/19/80 Tr." refers to the transcript of the hearing on the motion to withdraw. "Tr." refers to the transcript of the trial proceedings held July 14 through 17, 1980.

At a hearing on the motion to withdraw, held on June 19, 1980, respondent attempted to establish that Levine actually sought to withdraw because of a dispute over fees (6/19/80 Tr. 6-12). After the hearing had progressed for a short period, the court concluded that there was indeed a conflict of interest and hostility between respondent and Levine and Cummings, and it therefore granted Levine's motion to withdraw (*id.* at 12-14).

The trial previously had been scheduled for June 30, 1980, some 11 days later (6/19/80 Tr. 14-15). Respondent informed the court at the hearing of his view that he could not receive a fair defense if Colston were given only "one or two weeks to prepare" for trial (*id.* at 15). Levine told the court that Colston would need 30 days to prepare (*id.* at 18). Colston then requested a minimum of 30 days to prepare (*id.* at 19). The court granted a continuance, but decided to cut the continuance "a few days short" of the 30 days requested by Colston in order to have the trial commence on Monday, July 14, 1980, the first day of the court's July docket (*ibid.*). Neither petitioner nor Colston apparently thereafter raised any further objection to the July 14 trial date, and the Assistant United States Attorney expressed the view that this would afford counsel "enough time" (*ibid.*).

Colston stated at the hearing that the United States Attorney's Office had granted him access to the files in the postal inspector's office the previous day (6/19/80 Tr. 19), and the Assistant United States Attorney reiterated at the hearing that the responsible postal inspection official was prepared to meet with Colston at the latter's convenience for discovery purposes (*id.* at 20). At the close of the hearing, respondent informed the court that he had spoken with Colston and that Colston had "been most helpful" (*id.* at 23), but that he wanted to point out that Colston's specialty was real estate law

and that he had been involved in only one federal criminal case in the past (*ibid.*). The court stated that if respondent intended to request that he be permitted to select his own lawyer to be appointed by the court, that request was denied. The court explained that Colston was "very bright" and that he had been selected from an alphabetical list of lawyers in the district who were qualified and screened for this purpose (*ibid.*).

2.a. At trial, another attorney, Ryland Rivas, assisted Colston in his representation of respondent (Tr. 2, 302).[2] The government introduced evidence establishing the existence of the check-kiting scheme between accounts of Skyproof in banks in Tampa and Norman, with the checks cleared by the use of the mails through intermediate banks (*id.* at 92-105, 110-113, 114-130, 134-148, 150-151, 152-160, 167-184, 227-256, 261-283, 324-333). As a result of these transactions, the Norman Bank of Commerce suffered a loss of approximately $484,000 (*id.* at 176, 300, 448). The checks were signed by co-defendant Cummings, who was formally the president of Skyproof, but the evidence showed that respondent directed the affairs of Skyproof (*id.* at 169-172, 186, 223-224, 300-301, 304-307, 318, 320, 333, 340). Respondent had not been identified as an officer or owner of the company because of prior difficulties with the Internal Revenue Service and unfavorable publicity about prior business dealings (*id.* at 475). Co-defendants Cummings and Merritt, an accountant residing in Norman who participated in some of the transactions, testified for the government at trial.[3] Merritt's testimony showed that respondent was the true head of Skyproof and had directed its affairs (*id.* at 365, 368,

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[2] As explained below (see page 9, *infra*), the government filed with its petition for rehearing in the court of appeals an affidavit of Rivas averring that he had extensive experience in criminal cases and had assisted Colston at all stages of the proceedings.

[3] Cummings pleaded guilty to three counts of the indictment prior to trial (Tr. 526-527), and the government agreed to dismiss the indictment against Merritt if he testified truthfully at trial (*id.* at 418-419).

370, 373, 382, 389, 392, 394). Cummings' testimony also established that although she was president, respondent directed Skyproof's affairs, conceived of the check-kiting scheme, and generally instructed her to sign checks (*id.* at 479-488, 491-492, 494-496, 505, 508, 510-512).

On cross-examination of the government's witnesses, Colston repeatedly sought to have them confirm that Cummings was president of Skyproof and had signed the checks, thereby attempting to separate respondent from the transactions (See, *e.g.*, Tr. 131, 189-190, 194, 196, 201, 204, 256-260, 285-286, 302, 311, 321-322, 334-335, 428). As the court of appeals stated, "[d]efense counsel's trial strategy may be fairly summarized as putting the government to its proofs, pointing an accusatory finger at one of the allegedly defrauded banks, and arguing that the bank's toleration of overdrafts was an informal extension of credit to a legitimate business" (App. A, *infra*, 2a; see Tr. 87-92, 522-526, 529-536, 581-590).

b. At the close of the government's case, the defense made a motion to dismiss the indictment on the ground that the government had failed to establish any case against respondent. The district court denied the motion, concluding that the evidence presented a question for the jury (Tr. 567). The court had previously granted respondent's motion to subpoena seven witnesses, and at least some of these witnesses were present at the time of trial (*id.* at 572). Colston informed the court, however, that the defense would not call any witnesses (*id.* at 567-572). The court then questioned respondent to establish that he understood his rights. But before the court did so, the following colloquy occurred (*id.* at 568):

> THE COURT: * * * This young man, Colston, I think, has done a tremendous job representing you.
>
> [RESPONDENT]: I agree, certainly agree.

> THE COURT: You acted at one time that you weren't happy, but that was earlier when you hadn't seen him in action.
>
> [RESPONDENT]: I am certainly glad you overruled me.
>
> THE COURT: He's a very fine young lawyer and this other young man over there too. * * *

The court then proceeded to explain to respondent that he had the right to testify or not to testify, that if he did testify he would be subject to cross-examination on the basis of a prior conviction in Tampa for giving a false statement to a bank, and that he was entitled to have the jury instructed that no adverse inference should be drawn from his failure to testify (Tr. 568-571). Respondent stated that he would defer to counsel on whether the instruction should be given (*id.* at 568) and agreed that it should be. After discussing the possible use of the prior conviction, the court determined that respondent's decision not to take the stand was made intelligently, with knowledge of all the options (*id.* at 571). Immediately thereafter, in open court but out of the presence of the jury, a further exchange occurred regarding the performance of defense counsel (*ibid.*):

> THE COURT: I want to make a record on one thing I forgot, but the second after the Court Reporter left in there, [respondent] expressed his personal appreciation of these lawyers for the good work they have done and he wanted to make it a part of the record.
>
> [RESPONDENT]: I would also like to state the reason I went up to Mr. Colston's office yesterday was so that Mr. Emery, his senior law partner, would know that before I either won or lost.

After Colston expressed his satisfaction with the jury instructions, but before the jury retired to deliberate, the court similarly stated to Colston and co-counsel Rivas (*id.* at 599-600):

> Well, boys, I want to tell you again I appreciate you two, you know, this guy couldn't have got a better representation if he had hired someone in Florida or Oklahoma City or anyplace else and I appreciate it.

After deliberating for 2¼ hours, the jury returned a verdict of guilty on 11 counts and not guilty on two counts (Tr. 601).[4] Respondent was sentenced to 25 years' imprisonment and a fine of $11,000 (App. A, *infra*, 2a).

3. The court of appeals reversed respondent's convictions, concluding that he was denied the effective assistance of counsel at trial (App. A, *infra*, 2a). The court did not find it significant that, as the government contended, there was no showing that respondent's counsel had failed to exercise "'the skill, judgment and diligence of a reasonably competent attorney'"—the standard utilized by the Tenth Circuit for evaluating claims of ineffective assistance of counsel in other contexts (*id.* at 3a, quoting *Dyer* v. *Crisp*, 613 F.2d 275, 278 (en banc), cert. denied, 445 U.S. 945 (1980)). The court explained that under its prior decisions, when circumstances hamper a lawyer's preparation of the case, "the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel" (App. A, *infra*, 3a, citing *United States* v. *King*, 664 F.2d 1171, 1172-1173 (10th Cir. 1981), and *United States* v. *Golub*, 638 F.2d 185, 187 (10th Cir. 1980)). The court observed that instead, under *King* and *Golub*, the circumstances to be considered in determining whether inadequacy of representation may be "inferred" without proof of specific prejudice at trial include the following (App. A, *infra*, 4a):

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[4] After the court accepted the verdict, it briefly discussed the procedure regarding sentencing, observing that respondent could address the court personally and that his "very able lawyers" could speak for him as well (Tr. 603).

(1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel.

The court applied these factors not by independently assessing the performance of defense counsel in this case, but rather by comparing the circumstances present here with those present in *King*. Thus, the court observed that Colston had 25 days to prepare for trial of a case that the government had developed over a 4½ year period, as compared with 27 days for preparation of a defense to a tax fraud charge that the government developed over a three-year period in *King*. Respondent, the court observed, faced a sentence of up to 65 years imprisonment and actually was sentenced to 25 years, while in *King* the defendant faced a maximum sentence of only five years. The court further noted that *King* did not discuss the accessibility of witnesses, but that here, although no defense witnesses appeared, the government's witnesses came from four states (App. A, *infra*, 4a-5a).

The court did perceive a material distinction between this case and *King* in that the latter was apparently more complex, involving approximately 200 witnesses and 5,000 exhibits, as compared with 19 witnesses and 50 exhibits in this case (App. A, *infra*, 2a, 5a). Nevertheless, the court observed, "[respondent's] case was not an ideal one for an aspiring criminal defense lawyer to cut his teeth on" (*ibid.*), because mail fraud cases tend to be factually and legally complex. In addition, the court reasoned that if this case was indeed simpler than *King*, this advantage was offset by Colston's lack of experience in criminal trials (*ibid.*).

4. The government filed a petition for rehearing (*United States* v. *Cronic*, No. 80-1955 (10th Cir.)) with suggestion for rehearing en banc, noting (Reh. Pet. 1-2) that the claim of ineffective assistance of counsel

had been raised for the first time on appeal and arguing that a remand would be appropriate for an evidentiary hearing on the claim of ineffective assistance of counsel. The government also pointed out (Reh. Pet. at 7-8) that Colston was assisted by another attorney, Ryland Rivas. Rivas averred in an affidavit appended to the petition for rehearing that he had been admitted to practice since 1974 and was a member of the bars of the State of Oklahoma and the federal district court and court of appeals. He further averred that prior to 1980, the date of petitioner's trial, he "had extensive experience in the practice of criminal law and has tried jury cases ranging from escape from the penitentiary to murder in the 1st degree." He stated that he "assisted Mr. Chris Colston in his preparation of defenses for [respondent] and was present during all stages in the proceedings to assist Mr. Colston with the preparation and drafting of motions, examination of witnesses and examination of all evidence available to Mr. Colston." The government's petition for rehearing and suggestion for rehearing en banc were denied (App. C, *infra*, 9a).

REASONS FOR GRANTING THE PETITION

Despite the district court's and respondent's repeated statements at the close of trial that respondent's court-appointed attorneys performed admirably, the court of appeals reversed respondent's convictions on the ground that his Sixth Amendment right to the effective assistance of counsel had been violated at trial. The court did so without pointing to any manner in which counsel's performance was ineffective or identifying any act or omission of counsel that it regarded as error, and without indicating that it found respondent's defense to have been adversely affected by counsel's performance. This result conflicts with decisions of this Court and of other courts of appeals holding that in order for a conviction to be set aside under the Sixth Amendment because of the assertedly ineffective assistance of counsel,

the defendant must show that counsel's performance departed substantially from that which could be expected of a reasonably competent defense attorney and that some prejudice or likelihood of prejudice resulted.

The court of appeals appears to have attached primary significance to the fact that the continuance granted by the trial court allowed counsel only 25 days to prepare for trial. But the court did not find that allowing 25 days rather than the 30 days requested actually hindered counsel's preparation in any way that affected his performance at trial. Reversal of the convictions in these circumstances, without a showing of prejudice from the timing of the appointment of counsel or the length of the continuance granted, is also flatly inconsistent with a number of this Court's decisions and with the decisions of the other courts of appeals.

Moreover, the Tenth Circuit's decision in this case is just one in a series in which that court has adhered to an approach that is in conflict with well-established principles governing ineffective assistance of counsel claims. Review by this Court is required to restore consistency in this important area of the law.

1.a. The decisions of this Court make clear that in order for a conviction to be set aside under the Sixth Amendment on the basis of ineffective assistance of counsel, the defendant must show at a minimum that his attorney's performance in the case was below the range of competence that reasonably may be expected of counsel in criminal cases. *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970); *Tollett* v. *Henderson*, 411 U.S. 258, 266 (1973); see also *Engle* v. *Isaac*, No. 80-1430 (Apr. 5, 1982), slip op. 25; *Cuyler* v. *Sullivan*, 446 U.S. 335, 349 (1980); *Wainwright* v. *Sykes*, 433 U.S. 72, 96 (1977) (Stevens, J., concurring). The defendant must, in other words, show "serious derelictions" on the part of trial counsel. *McMann* v. *Richardson*, *supra*, 397 U.S. at 774. Consistent with this Court's teachings, the decisions of other courts of

appeals likewise have stressed that counsel's performance must have departed significantly from what may be expected of reasonably competent defense counsel.[5]

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[5] See, *e.g.*, *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979) ("serious dereliction"); *United States* v. *Sanford*, 673 F.2d 1070, 1073 (9th Cir. 1982) (same); *Long* v. *Brewer*, 667 F.2d 742, 745 (8th Cir. 1982) ("serious incompetency"); *Boyd* v. *Estelle*, 661 F.2d 388, 389 (5th Cir. 1981) ("seriously inadequate" performance); *Taylor* v. *Starnes*, 650 F.2d 38, 41 (4th Cir. 1981) ("flagrant" error); *Marzullo* v. *State of Maryland*, 561 F.2d 540, 544 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) (same); *United States* v. *Decoster*, 624 F.2d 196, 208 (D.C. Cir.) (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979) ("serious incompetency"); 624 F.2d at 232 (MacKinnon, J., concurring) ("substantial breach" of duty); *id.* at 246 (Robinson, J., concurring) (same); *id.* at 275 (Bazelon, J., dissenting) (same); *United States* v. *Wood*, 628 F.2d 554, 559 (D.C. Cir., 1980) (en banc) (same); *United States* v. *Green*, 680 F.2d 183, 188 (D.C. Cir. 1982) ("serious incompetency").

The Second Circuit continues to state the test for considering claims of ineffective assistance of counsel in terms of whether counsel's performance rendered the trial a "farce and mockery" of justice. See, *e.g.*, *United States* v. *Helgesen*, 669 F.2d 69, 71 (1982); *United States* v. *Wight*, 176 F.2d 376, 379 (1949), cert. denied, 338 U.S. 950 (1950). This language, too, emphasizes that counsel's performance must be shown to have been seriously incompetent.

Other courts of appeals have stated that a defendant is entitled only to the assistance of counsel who is reasonably competent or satisfies mimimum standards of professional competence and that he is not entitled to error-free representation. See, *e.g.*, *Wiley* v. *Sowders*, 647 F.2d 642, 648 (6th Cir.), cert. denied, 454 U.S. 1091 (1981); *Alicea* v. *Gagnon*, 675 F.2d 913, 926 (7th Cir. 1982); *United States* v. *Murzyn*, 631 F.2d 525, 533-534 (7th Cir. 1980), cert. denied, 450 U.S. 923 (1981). Indeed, the Tenth Circuit itself has stated that a defendant ordinarily must show that his lawyer's performance fell below that expected of a reasonably competent defense attorney. *Dyer* v. *Crisp*, *supra*, 613 F.2d at 278. The Tenth Circuit felt free to abandon that requirement here because it framed the issue in terms of counsel's opportunity for trial preparation (App. A, *infra*, 3a).

The court of appeals ignored these principles in the instant case when it concluded (App. A, *infra*, 4a) that it could find that respondent was deprived of the effective assistance of counsel at trial without any inquiry into whether Colston's representation in fact was adequate under the circumstances. The court did not even identify any act or omission of counsel at trial that it regarded as error, much less conclude that Colston's performance was outside the range of competence that reasonably may be expected of defense counsel in criminal cases. The court, for example, did not fault counsel's cross-examination of government witnesses; his choice of a defense strategy to put the government to its proofs and to distance respondent from Cummings' check-writing, but not to call any defense witnesses; or the decision that respondent would not take the stand, in view of his prior conviction. In the absence of proof and findings of such deficiencies, there was no basis whatever for the court below to hold that respondent was denied his right to the effective assistance of counsel.

The court of appeals did observe that Colston's prior experience in criminal cases was limited to involvement in one other trial, and the court rested its finding of ineffective assistance of counsel in part on its view that "[respondent's] case was not an ideal one for an aspiring criminal defense lawyer to cut his teeth on" because mail fraud cases "tend" to be legally and factually complex (App. A, *infra*, 5a).[6] The question before the court

[6] Although the court observed that mail fraud cases "tend" to be factually and legally complex, it did not make any effort to assess the actual complexity of this particular case or Colston's grasp of it. The court simply noted in its recitation of the facts that the government's case involved the testimony of Cummings, Merritt, and 17 other witnesses, as well as 50 exhibits (App. A, *infra*, 2a), and indeed acknowledged that this case was apparently less complex than *King*, where there were 200 witnesses and 5,000 exhibits (*id.* at 5a).

of appeals, however, was not whether this was an "ideal" case for Colston to handle, but rather whether respondent received constitutionally adequate assistance of counsel. As explained above, the court of appeals cited nothing to suggest that he did not. Absent a showing that counsel's inexperience had an adverse impact on his conduct of the trial, that inexperience does not give rise to a Sixth Amendment violation. See, *e.g.*, *Daniels* v. *Maggio*, 669 F.2d 1075, 1082-1083 (5th Cir. 1982). Moreover, the court of appeals entirely ignored the fact that Colston was assisted prior to and during trial by Rivas, an experienced criminal defense attorney.

The court of appeals also believed that respondent was excused from the need to show specified errors in Colston's performance because, in its view, the defendant need not point to any particular failing "when circumstances hamper a given lawyer's preparation of a defendant's case" (App. A, *infra*, 3a-4a). This reasoning is flawed for at least two reasons. First, there has been no showing that circumstances had any effect on the preparation of the defense by Colston and Rivas. Second, even if there had been a factual determination that circumstances did bring some temporal or other pressures to bear on the attorneys in their preparation of the case, the same could probably be said of an attorney's preparation of almost any case. The proper question, then, is not whether the attorney's preparation of the case was "hampered," but whether the representation the defendant ultimately received was constitutionally adequate. A court therefore cannot simply "infer" a Sixth Amendment violation, as the court of appeals did here (App. A, *infra*, 3a-4a), without a firm basis for believing that asserted defects in preparation in turn caused a serious deficiency in counsel's performance at trial.

b. The decision of the court below also is inconsistent with the prevailing view of the courts of appeals that even if counsel's performance is found to have been below the range of reasonable competence, relief is not afforded under the Sixth Amendment absent some finding of prejudice or likely prejudice to the defendant or an adverse impact on the conduct of his case.[7] See generally *Washington* v. *Strickland*, 673 F.2d 879, 895-902 (5th Cir. 1982) (collecting cases in the circuits).[8] See also *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970); cf. *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980). The

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[7] See, *e.g.*, *United States* v. *Green*, 680 F.2d 183, 188 (D.C. Cir. 1982); *United States* v. *Wood*, 628 F.2d 554, 559 (D.C. Cir. 1980) (en banc); *United States* v. *Decoster*, 624 F.2d 196, 208 (D.C. Cir.) (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979); 624 F.2d at 232 (MacKinnon, J., concurring); *United States* v. *Aulet*, 618 F.2d 182, 188 (2d Cir. 1980); *United States* v. *Baynes*, No. 81-1620 (3d Cir. Aug. 11, 1982) slip op. 17–21; *Marzullo* v. *State of Maryland*, 561 F.2d 540, 546 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978); *Boyd* v. *Estelle*, 661 F.2d 388, 389 (5th Cir. 1981); *United States* v. *Murzyn*, 631 F.2d 525, 534 (7th Cir. 1980), cert. denied, 450 U.S. 923 (1981); *United States* v. *Kelly*, No. 82–1074 (8th Cir. Sept. 2, 1982) slip op. 3; *Long* v. *Brewer*, 667 F.2d 742 (8th Cir. 1982); *United States* v. *Donn*, 661 F.2d 820, 824 (9th Cir. 1981); *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1331-1333 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979); see also *United States* v. *Renfro*, 600 F.2d 55, 58 (6th Cir.), cert. denied, 444 U.S. 941 (1979). But see *Wiley* v. *Sowders*, 647 F.2d 642, 650 (6th Cir.), cert. denied, 454 U.S. 1091 (1981) (question whether prejudice must be shown remains open). Indeed, the Tenth Circuit previously had indicated that prejudice must be shown, *Dyer* v. *Crisp*, *supra*, 613 F.2d at 278, a position abandoned in *Golub*, *King*, and the instant case.

[8] As explained in *Washington* v. *Strickland*, *supra*, 673 F.2d at 895-902, there is some divergence among the circuits regarding the *degree* of prejudice that must be shown and whether a showing of prejudice is an element of establishing a Sixth Amendment violation or simply a requirement for obtaining relief. Cf. *United States* v. *Morrison*, 449 U.S. 361, 364 (1981).

view of these circuits is consistent with this Court's recent decision in *United States* v. *Morrison*, 449 U.S. 361 (1981).

In *Morrison*, the Court stressed that cases involving deprivations of the Sixth Amendment right to counsel are subject to the general rule that remedies should be tailored to the injury suffered as a result of the constitutional violation and should not unnecessarily infringe upon the competing societal interest in the administration of justice. 449 U.S. at 364. After reviewing its prior decisions, the Court explained (*id.* at 365):

> Our approach has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial. The premise of our prior cases is that the constitutional infringement identified has had or threatens some adverse effect upon the effectiveness of counsel's representation or has produced some other prejudice to the defense. Absent such impact on the criminal proceedings, however, there is no basis for imposing a remedy in that proceeding, which can go forward with full recognition of the defendant's right to counsel and to a fair trial.

Here, there has been no showing that any errors in counsel's performance, assuming there were any of significance, had an adverse impact on the defense. Absent such an adverse impact in the criminal proceeding itself, "there is no basis for imposing a remedy in that proceeding" (*ibid*) by reversing respondent's convictions.

The court of appeals attempted to reconcile its holding with this Court's decision in *Morrison* by observing (App. A, *infra*, 3a) that nothing in *Morrison* suggests that a "substantial threat [of prejudice]" (449 U.S. at 365) warranting reversal of a conviction "may not be inferred from the circumstances of pretrial and trial representation" (App. A, *infra*, 3a). Even assuming,

however, that a "substantial threat of prejudice" might be inferred in unusual circumstances despite the absence of any showing of specific failings by counsel, nothing in the circumstances of this case indicates that such an inference would be warranted.

c. The court of appeals expressed the view that it was not necessary to identify specific failings of counsel in a case in which the lawyer's preparation might have been hindered, because, it believed, an appellate court cannot say "precisely how a given case would have been handled by a reasonably diligent and properly prepared lawyer" (App. A, *infra*, 3a).[9] We submit, however, that the court of appeals clearly erred in believing that it was somehow inappropriate or unfair to require respondent to make a showing that his lawyer's performance was outside the range of reasonable competence.

If the basis of a defendant's claim is that the lawyer who represented him did not adequately prepare, he should be capable of demonstrating the nature of counsel's omissions—*e.g.*, by identifying a witness who should have been, but was not, interviewed and called to testify; evidence that might have been unearthed with greater diligence; legal motions that would have been made by a more attentive lawyer; or a basis for impeaching government witnesses that might have been developed. If the defendant cannot make such a showing, then the asserted lack of preparation cannot be said to have rendered counsel's assistance "ineffective" in the sense of having had an adverse effect on the presentation of the defense, and there accordingly is no basis for finding a Sixth Amendment violation. The District of Columbia Circuit stressed this point in its seminal en banc decision in *United States* v. *Decoster*, 624 F.2d 196 (D.C. Cir.), cert. denied, 444 U.S. 944 (1979).

[9] Of course, as we have already explained, the court pointed to no evidence that Colston and his colleague were not themselves "reasonably diligent" and "properly prepared."

There the court rejected the dissenting judges' emphasis on specific duties of counsel in the abstract, and held instead that an asserted failure to investigate—a concrete example of a failure to prepare that was shown there and is absent here—must be considered in terms of whether there was any resulting impact on the prospects for a successful defense at trial. 624 F.2d at 208-213, 215-217 (plurality opinion); *id.* at 232-234, 244-245 (concurring opinion).

2. The decision below also requires review for reasons other than its inconsistency with prevailing case law regarding ineffective assistance of counsel claims generally. It also is in conflict with the decisions of this Court and the courts of appeals specifically addressing the question of when reversal of a conviction is appropriate because of the timing of the appointment of counsel or the denial of a request for a continuance to permit counsel additional time to prepare.

In *Chambers* v. *Maroney*, *supra*, the defendant claimed that the appearance of the Legal Aid attorney on the day of trial was so belated that it must be conclusively presumed that he could not have furnished effective assistance. The Court rejected the ineffective assistance of counsel claim because there was no showing of prejudice resulting from the late appearance of counsel. 399 U.S. at 53-54; see also *Mancusi* v. *Stubbs*, 408 U.S. 204, 214 (1972). In the instant case, there likewise was no showing that prejudice resulted from the fact that Colston and Rivas had "only" 25 days to prepare for trial. It therefore follows a fortiori from *Chambers* v. *Maroney* that there was no basis for finding ineffective assistance of counsel here.

Colston did move for a continuance to permit him to prepare for trial. The court granted that request, although it limited the time to prepare for trial to 25 days rather than the requested 30 days (6/19/80 Tr. 19). "The matter of continuance is traditionally within the discre-

tion of the trial judge" (*Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964)), and will be reviewed only for an abuse of discretion. See, *e.g.*, *United States* v. *Phillips*, [illegible] F.2d 87, 92-93 (7th Cir.), cert. denied, 451 U.S. 991 (1981). "Since the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the fact, standing alone, that a continuance has been denied [or, as here, cut back,] does not constitute a denial of the constitutional right to assistance of counsel." *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940).

A constitutional violation will be found only if the denial of the requested continuance results in the denial of opportunity for appointed counsel even to consult with the accused and prepare his defense, and thereby "convert[s] the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." 308 U.S. at 446. In such circumstances, a court might conclude that circumstances affirmatively "*preclude*[*d*] the giving of effective aid in the preparation and trial of the case." *Powell* v. *Alabama*, 287 U.S. 45, 71 (1932) (emphasis added). See, *e.g.*, *Hawk* v. *Olson*, 326 U.S. 271, 276-278 (1945); *White* v. *Ragen*, 324 U.S. 760, 764 (1945). But where counsel has been afforded a minimum period of time to prepare—a period far exceeded by the 25 days allowed in this case—the defendant must at the very least make a showing that counsel could have done more at trial had additional time been granted. *Avery* v. *Alabama*, *supra*, 308 U.S. at 452. The decisions of other courts of appeals likewise require some concrete showing of prej-

udice from the denial of a continuance in such circumstances.[10] In this case, in contrast, there has been no such showing or finding.

3. The Tenth Circuit's approach in this case trivializes the Sixth Amendment issue by reducing it to an essentially arithmetic inquiry into the number of witnesses and exhibits in the case, the number of days counsel had to prepare, and the number of prior criminal cases handled by the attorney. Such a mechanical approach divorces the inquiry from any consideration of how counsel actually performed at trial and therefore from whether counsel rendered reasonably competent assistance.[11]

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[10] *United States* v. *Veatch*, 647 F.2d 995, 1004-1005 (9th Cir. 1981), cert. denied, No. 81-1764 (Apr. 26, 1982); *United States* v. *Phillips*, *supra*, 640 F.2d at 92-93; *United States* v. *Baduan*, 624 F.2d 1228, 1231 (4th Cir. 1980), cert. denied, 449 U.S. 1124 (1981). Indeed, the Tenth Circuit itself has recognized the same principle when it considered the issue in terms of a denial of a continuance, rather than the effective assistance of counsel. See, *e.g.*, *United States* v. *Gonzalez-Palma*, 645 F.2d 844, 846-847, cert. denied, 454 U.S. 869 (1981).

[11] While mail fraud prosecutions can be complex, there is little in this case to suggest that 25 days was not entirely adequate preparation time. After the initial grant of a continuance, it appears that neither respondent nor his counsel subsequently gave any indication to the court that further time was needed to complete investigation or trial preparation. And the existence of the fraud itself was convincingly established by clear and undisputed evidence of the check-kiting transactions. The only issue for the jury was respondent's role and responsibility for the fraudulent activities. This turned principally on the credibility of the testimony of his two co-defendants and several other witnesses who identified respondent as the principal participant in the affairs of Skyproof. In sum, the actual facts of this case did not confront respondent's counsel with a task of unusual complexity that would have placed the trial court on notice that a sua sponte grant of a further continuance was needed.

The abstract nature of the Tenth Circuit's decision is highlighted by the fact that the court ignored both that Colston was assisted prior to and at trial by an experienced criminal defense lawyer and that the trial court and respondent himself repeatedly expressed the view that Colston and his colleague had performed admirably. The court of appeals' reversal of the convictions on this record underscores the wisdom of the rule in other circuits that ineffective assistance of counsel claims ordinarily should be presented in the first instance to the trial court, which can conduct an evidentiary inquiry into the adequacy of counsel's preparation and performance and the impact of any asserted errors. See, *e.g.*, *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981); *United States* v. *Aulet*, 618 F.2d 182, 185-186 (2d Cir. 1980); *United States* v. *Schreiber*, 599 F.2d 534, 538 (3d Cir.), cert. denied, 444 U.S. 843 (1979).

The Tenth Circuit's decision in this case is not an aberration; it is one of a series of cases involving claims of inadequate preparation by counsel, including *United States* v. *King* and *United States* v. *Golub*, *supra*,[12] in which that court has continued to apply a formula that eschews any inquiry into the actual impact on the defense presented at trial. See also *United States* v. *La Monte*, No. 81-1887 (10th Cir. July 27, 1982), slip op. 4. Moreover, the result of the court's emphasis on Colston's lack of prior experience in criminal cases will be to undermine the ability of the district courts in that circuit to appoint counsel who have not had extensive prior experience in criminal cases, for fear that they will be branded as inept even in the absence of any concrete indication that they performed in a substandard manner. Thus, the potentially significant practical con-

[12] At this writing, the government's petition for rehearing in *Golub* is still pending before the court of appeals, following a remand to the district court for certain evidentiary findings.

sequences of this decision for trial courts in making appointments of counsel and passing upon continuance requests are further reasons for review by this Court.[13]

CONCLUSION

The petition for writ of certiorari should be granted.[14]

Respectfully submitted.

REX E. LEE
Solicitor General
D. LOWELL JENSEN
Assistant Attorney General
EDWIN S. KNEEDLER
Assistant to the Solicitor General

OCTOBER 1982

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[13] Although other aspects of the right to counsel are involved in *Morris* v. *Slappy*, No. 81-1095, and *Jones* v. *Barnes*, No. 81-1794, in our view the ineffective assistance of counsel issues presented here are sufficiently distinct from the issues in those two cases that the petition should not be held pending the decision in those cases.

[14] The Court may wish to consider summary reversal, in view of (a) this Court's prior decisions establishing that a defendant raising a Sixth Amendment claim of ineffective assistance of counsel must show that his attorney's performance departed substantially from that rendered by reasonably competent defense counsel, (b) the Court's prior decisions regarding the showing that must be made to obtain a reversal of a conviction on the basis of a denial of a continuance or the timing of the appointment of counsel, and (c) the absence of any finding that respondent was prejudiced or his counsel's performance adversely affected by the fact that counsel had "only" 25 days to prepare for trial.

APPENDIX A

UNITED STATES COURT OF APPEALS,
TENTH CIRCUIT.

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

HARRISON P. CRONIC,
DEFENDANT-APPELLANT.

No. 80-1955.

April 19, 1982.

David L. Russell, U.S. Atty., John E. Green, First Asst. U.S. Atty., Oklahoma, City, Okl., for plaintiff-appellee.

Harrison P. Cronic, defendant-appellant, pro se.

David W. Duncan, Duncan & Chew, Durango, Colo., for defendant-appellant.

Before SETH, Chief Judge, SEYMOUR and PECK*, Circuit Judges.

JOHN W. PECK, Circuit Judge.

The dispositive issue on appeal in this case is whether appellant Cronic was denied effective assistance of counsel in the trial at which he was convicted of eleven counts of mail fraud.

The relevant facts are as follows. Cronic was indicted, with two codefendants, on thirteen counts of mail fraud and unlawful use of a fictitious name, 18 U.S.C. §§ 1341 & 1342. The indictment was handed

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* Honorable John W. Peck, United States Circuit Judge for the Sixth Circuit, sitting by designation.

down on Feb. 5, 1980, nearly five years after the alleged commission of the offenses charged. Cronic and two business associates, Merritt and Cummings, were charged in this indictment with kiting checks between banks in Tampa, Florida and Norman, Oklahoma. The checks were drawn on the accounts of Skyproof Manufacturing, Inc., a Florida company that was held out as a manufactory of roof trusses for mobile homes.

The government's evidence at trial purported to show that the alleged check-kiting scheme was masterminded by Cronic, for whom Skyproof was a "front". Principal government witnesses were former codefendants Merritt and Cummings, who had plea-bargained. These witnesses identified Cronic as the true head of Skyproof, which was nominally held by Cummings. The government's other proof comprised the testimony of seventeen witnesses from four states, as well as over fifty documentary exhibits.

At trial Cronic was represented by a court-appointed attorney who specialized in real-estate law. This attorney's experience in federal criminal practice is not clear from the record, but Cronic's defense was at best his second venture into that field. Court-appointed counsel had twenty-five days to prepare Cronic's case. The government's investigation of that case yielded, as the United States' attorney testified before the grand jury, literally thousands of documents, including hundreds of checks. Defense counsel's trial strategy may be fairly summarized as putting the government to its proofs, pointing an accusatory finger at one of the allegedly defrauded banks, and arguing that the banks' toleration of overdrafts was an informal extension of credit to a legitimate business.

Cronic was convicted on eleven of thirteen counts and given a committed sentence of twenty-five years plus an $11,000 fine. He argues that this sentence was based on erroneous information, but our disposition of this

case moots this issue. We vacate Cronic's convictions on the grounds that he was denied effective assistance of counsel.

I. *Morrison* and the Burden of Showing Prejudice from Violations of the Sixth Amendment.

The government argues that Cronic has not shown on appeal that his trial lawyer failed to exercise "the skill, judgment and diligence of a reasonably competent defense attorney", which is how the Sixth Amendment right to assistance of counsel is described in this Circuit. See *Dyer* v. *Crisp*, 613 F.2d 275, 278 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945, 100 S.Ct. 1342, 63 L.Ed.2d 779 (1980). Cases after *Dyer* have established that when circumstances hamper a given lawyer's preparation of a defendant's case, the defendant need not show specified errors in the conduct of his defense in order to show ineffective assistance of counsel. See *United States* v. *King*, 664 F.2d 1171, 1172-73 (10th Cir. 1981); *United States* v. *Golub*, 638 F.2d 185, 187 (10th Cir. 1980). This is an eminently reasonable rule, for there is no way an appellate court can say precisely how a given case would have been handled by a reasonably diligent and properly prepared lawyer. The prejudice from lack of preparation and experience cannot be nicely weighed.

There is no conflict between the rule of *King* and *Golub* and the Supreme Court's opinion in *United States* v. *Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981). In *Morrison* the Court held that pretrial "interference" with the right to counsel did not warrant the most drastic remedy of dismissing an indictment "absent demonstrable prejudice, or substantial threat thereof". *Id.* at 365, 101 S.Ct. at 667. Nothing in *Morrison* suggests that "a substantial threat of prejudice" may not be inferred from the circumstances of pretrial and trial representation. Nothing in

Morrison suggests that reversal of a conviction may not be "relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial". *Id.* at 365, 101 S.Ct. at 667.

II. Application of *King-Golub* Tests to Cronic's Case.

Under *King* and *Golub*, the circumstances to be considered in determining whether inadequacy of representation may be inferred without proof of specific prejudice at trial include: "(1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel." *King, supra*, 664 F.2d at 1173; *Golub, supra*, 638 F.2d at 189. Comparison of Cronic's case with King's is apt. King's attorney was given 27 days to research and prepare a defense to a tax fraud charge that the government developed over a three year period. Cronic's attorney was given 25 days[1] to prepare a defense to a mail fraud charge that the government had developed over a four-and-one-half year period. King faced a sentence of up to five years; Cronic faced a sentence of up to sixty-five years, and was in fact sentenced to twenty-five years. *King* does not note the

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[1] Cronic's court-appointed attorney asked for a minimum of thirty days to prepare. This was the minimum figure suggested by Cronic's previous attorney, a former U.S. Attorney with considerable experience in criminal practice. The court granted Cronic's court-appointed attorney a twenty-five day continuance. Cronic himself asked for a more experienced attorney, but was told that if he wanted to choose his attorney he should hire one. The aptness of that remark is underscored by Cronic's professed ability to come up with $350,000 to reimburse a defrauded bank, *after* he had been convicted.

It is also of interest that Cronic declared his indigency after stating in a pro se motion that it was "unreasonable of [Cronic's retained counsel] to believe he would not receive his fee in full".

accessibility of witnesses to counsel. In Cronic's case no defense witnesses appeared, but the government's witnesses came from four different states. Cronic lived in Florida and Georgia, his attorney in Oklahoma.

The only material distinction between King's case and Cronic's is that the former was apparently more complex, involving approximately 200 witnesses and 5,000 exhibits. See 664 F.2d at 1172. Nevertheless, Cronic's case was not an ideal one for an aspiring criminal defense lawyer to cut his teeth on. As Judge Doyle stated in *Golub*, "[m]ail fraud cases tend to be factually and legally complex. [Golub's case] called for a lawyer who had experience in criminal trials and/or knowledge of fraud claims". 638 F.2d at 188. If Cronic's case was indeed simpler than King's, this advantage was offset by his appointed counsel's total or near-total lack of relevant experience.[2] In sum, we hold that *King* controls and requires reversal of Cronic's conviction.

We do not hold that an attorney's lack of relevant experience inevitably gives rise to ineffective assistance of counsel. We simply hold that on the facts of this case, applying the criteria set down in *King* and *Golub*, Cronic cannot be said to have been adequately represented.

III. Issues on Retrial

Cronic raises several other issues that might arise again should he be retried. He argues that the trial court erred in allowing one Levine, who once represented Skyproof, Cronic, and codefendant Cummings, to withdraw as Cronic's counsel and to continue as Cummings'. Cummings, as noted, plea-bargained and

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[2] Court-appointed counsel's prior experience in federal criminal practice was limited (as told to Cronic in court) to "involvement" in one other case. Counsel told the jury during opening argument that Cronic's defense was his "first trial".

testified against Cronic. Her testimony portrayed Cronic as the true perpetrator of the alleged check-kiting. Cross-examination by Cronic's trial counsel stressed that Cummings was the legal owner of Skyproof, through which the kiting was supposedly done. This bears out that there was a clear conflict of interest between Cronic and Cummings, and the trial court was amply justified in allowing Levine to withdraw as Cronic's counsel.

There was likewise no error in allowing Levine to continue as Cummings' attorney. Levine asserted that he learned no damaging privileged information in the course of his prior representation of Cronic. His assertions were borne out by the events at trial: Levine himself did not testify, and Cummings' testimony raises no doubts of any breach of Cronic's attorney-client privilege. Cummings' own constitutional right to counsel of her own choosing outweighed any interest in avoiding the vague "improprieties" alleged by Cronic.

Cronic also argues that the trial court erred in not requiring disclosure of grand jury attendance records so that Cronic could determine if the indictment was found by twelve "informed" grand jurors. Cronic relies in this argument particularly on *United States* v. *Leverage Funding Systems, Inc.*, 478 F.Supp. 799, 800 (C.D.Cal. 1979). *Leverage Funding* was reversed by the Ninth Circuit eight months before the filing of appellant's briefs. See *United States* v. *Leverage Funding Systems, Inc.*, 637 F.2d 645, 648–49 (9th Cir. 1980), *cert. denied*, 452 U.S. 961, 101 S.Ct. 3110, 69 L.Ed.2d 972 (1981). We agree with the Ninth Circuit that there is no statutory or legal requirement that at least twelve grand jurors who vote to indict have heard all the evidence relevant to that indictment. *See id.* The trial court therefore did not err in refusing to order discovery of grand jurors' attendance records. Nor did the district court abuse its discretion in refusing to order

pretrial disclosure of testimony before the grand jury, for Cronic had shown no particularized need for such disclosure. *See e.g., United States* v. *Parker*, 469 F.2d 884, 889 (10th Cir. 1972).

The judgment of conviction is hereby vacated, and the case is remanded for further proceedings not inconsistent herewith.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MARCH TERM

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

HARRISON P. CRONIC,
DEFENDANT-APPELLANT.

No. 80–1955

(D.C. No. CR-80-21-E)

April 19, 1982

JUDGMENT

Before Honorable Oliver Seth, Honorable Stephanie K. Seymour, and Honorable John W. Peck*, Circuit Judges

This cause came on to be heard on the record on appeal from the United States District Court for the Western District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is vacated. The cause is remanded to the United States District Court for the Western District of Oklahoma, for further proceedings in accordance with the opinion of this Court.

/s/ _____
HOWARD K. PHILLIPS, *Clerk*

A true copy
HOWARD K. PHILLIPS,
CLERK, U.S. COURT OF
APPEALS, TENTH CIRCUIT

BY
/S/ OPAL A. CARTER
Deputy Clerk

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* Honorable John W. Peck, United States Circuit Judge for the Sixth Circuit, sitting by designation.

APPENDIX C

UNITED STATE COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAY TERM

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

HARRISON P. CRONIC,
DEFENDANT-APPELLANT.

No. 80-1955

July 16, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan and Honorable Stephanie K. Seymour, Circuit Judges.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ _____
HOWARD K. PHILLIPS,
Clerk